IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

M/s Shah Chunni Lal Shanti Lal Jian	vs.	M/s Gopal Industries & anr.

S.B. Civil Second Appeal No. 6/1984 against the judgment and decree dated 19.7.1983 passed by the learned Addl. Civil Judge & Addl. Chief Judl. Magistrate No.2, Udaipur in Case No.19/81

Date of Judgment: March 13 , 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Ms. Anand Purohit for the appellant.

REPORTABLE

BY THE COURT:

This second appeal is against the judgment and decree passed by the first appellate court dated 19.7.1983 whereby the first appellate court allowed the appeal of the defendant-respondents and set aside the judgment and decree of the trial court dated 25.7.1981 after holding that instead of filing the suit for recovery of the ascertained amount of Rs.4861/-, the plaintiff should have filed the suit for rendition of accounts because of the view taken by the first appellate court that the transaction between the parties was in relation to open, mutual and current account and not of advancing loan by the plaintiff to the defendant. The first appellate court, after setting aside the money

decree passed by the trial court, passed the preliminary decree for rendition of accounts between the plaintiff and the defendant. The plaintiff also preferred First Appeal No.19/81 because of the reason that the trial court did not award interest over the decretal amount. The first appellate court dismissed the plaintiff's First Appeal No.19/81 holding it to be infructuous in view of allowing the appeal of defendant No.20/81 by the first appellate court.

Following substantial question of law was framed by this Court while admitting this appeal on 18.7.1985:-

> "Whether the suit filed by the plaintiff was not maintainable as there existed open, mutual and current accounts between the parties and the plaintiff should have filed a suit for rendition of the accounts?"

Brief facts of the case are that the plaintiff, in his plaint, submitted that the plaintiff is doing business in the name of M/s Shah Chunni Lal Shanti Lal Jian. The firm has four partners. Defendant no.1 is also a trading firm and defendant no.2 is defendant No.1's partner. According to the plaintiff, the defendant took loan of Rs.9000/- from the plaintiff-firm on 13.9.1975. Out of this loan amount, Rs.5000/- was repaid to the plaintiff by the defendant no. 15.9.1975, therefore, Rs.4000/- remained due in defendant of the plaintiff. The plaintiff also stated that as per the books of accounts, Rs.288/- of the defendant is due in plaintiff, so the plaintiff adjusted Rs.288/- against the remaining

loan amount of Rs.4000/- and, therefore, is filing the suit for recovery of Rs.3712/-. The plaintiff also claimed interest over the said amount of Rs.3712/-@ 1% per month amount to Rs.1159/-. On these facts, the plaintiff claimed decree of Rs.4861- against the defendants.

The defendants submitted written statement and admitted that the defendants had transaction with the plaintiff, however, according to the defendants, this transaction was open, mutual and current account. According to the defendants, the defendants did not take loan of Rs.9000/- as alleged by the plaintiff. It is also stated that actually this amount was due of the defendants in plaintiff, therefore, the amount was paid to the defendants by the plaintiff. It is also admitted by the defendants that Rs.5000/- was paid by the defendant-firm to the plaintiff-firm but for this, the amount was not against the repayment of the loan amount but it was against the settlement of account, the account referred above. It is also stated by the defendant that defendant's Rs.288/- only was not due in the plaintiff but it was more. The defendant further submitted that the account has not been finally settled between the parties whereas the defendant-firm has more money to get from the plaintiff. It will be worthwhile to mention here that even after claiming defendant's money due in the plaintiff, the plaintiff did not submit counter claim against the plaintiff.

In the trial court, issues were framed only in relation to the

allegations and counter allegations in the pleadings and which are; whether the plaintiff-firm is registered partnership firm, whether the plaintiff advanced loan of Rs.9000/- to the defendant on 13.9.1975, whether the above amount was paid to the defendant against the settlement of amount, whether the defendant paid Rs.5000/- to the plaintiff against the earlier account, whether Rs.288/- of defendant was due in plaintiff and whether the plaintiff is entitled to interest. On the basis of the plea taken by the defendant, a specific issue was framed that since no final account has been taken about the transaction between the plaintiff and defendant, therefore, the plaintiff's suit is not maintainable. The trial court held that the plaintiff-firm is registered partnership firm. The plaintiff advanced Rs.9000/- to the defendant and the defendant re-paid Rs.5000/- against this loan amount and the trial court also held that the plaintiff was not required to file the suit for redemption of accounts looking to the facts of the case. The trial court, therefore, decreed the plaintiff's suit for principal amount of Rs.3712/-. The trial court held that neither the defendant nor the plaintiff levied interest over any due amount, therefore, the plaintiff is not entitled to interest over the said amount.

The plaintiff and defendant both preferred appeal against the judgment and decree of the trial court dated 25.7.1981. The plaintiff was aggrieved because interest was not awarded by the trial court. The

defendant was aggrieved because of the reason that the money decree was granted against the defendant. The first appellate court observed that since there were commercial transactions between the parties and this fact is coming out from the plaint reading itself, therefore, the plaintiff should have filed the suit for rendition of accounts and after holding so, the first appellate court, set aside the money decree and passed the preliminary decree for rendition of accounts. This second appeal is by the plaintiff.

The learned counsel for the appellant vehemently submitted that the plaintiff clearly stated that the plaintiff paid Rs.9000/- as loan to the defendant and this fact has been proved by the plaintiff by producing the books of accounts. So far as receipt of Rs.9000/- by the defendant is concerned, that fact is an admitted fact. The defendant also admitted repayment of Rs.5000/- as claimed by the plaintiff. The defendant did not produce the cash book and other relevant accounts books except copy of ledger to prove that Rs.9000/- was not paid as cash loan to the defendant. It is also submitted that even if there is open, mutual and current account, one party can advance the money to other party. In the present case, the plaintiff filed the suit for specified amount and for that the defendant could have taken plea that as per the account, the said amount is not due or could have taken defence that the plaintiff owed money to the defendant. In that fact situation,

the only remedy available to the plaintiff was to file suit for recovery of ascertained amount and the suit for rendition of account would not have been appropriate suit.

I considered the submissions of the learned counsel for the petitioner and perused the record also.

It appears that the first appellate court under wrong assumption, assumed that in a case where there is open, mutual and current account, there cannot be advancement of loan by one party to other. The court below also proceeded on wrong assumption of law that in case where there is open, mutual and current account between the two parties, one party cannot maintain the suit for specified amount which according to the plaintiff, is the final amount due in defendant. It may be another thing that the defendant may take a plea that the said amount is not due in him as per the total account to defeat the suit of the plaintiff but the defendant cannot say that the plaintiff who is sure about his due in the defendant, can only file suit for rendition of accounts and for which the plaintiff, in his opinion, has no reason to seek relief of rendition of account because of clarity in the mind of the plaintiff about the total due amount in defendant. The first appellate court also committed error of law by converting money suit into suit for rendition of accounts and thereafter, decreeing it as suit for rendition of accounts. If the plaintiff's suit as framed by the plaintiff was not

maintainable then how the first appellate court could have converted the money recovery suit into suit of different nature that is suit for rendition of account and could have decreed at appellate stage. It appears that the first appellate court only permitted the defendants to reopen the entire suit by permitting them to take accounts again in a case where the plaintiff proved advancement of cash loan to the defendants and receipt of that amount is admitted by the defendants. Not only this, in the present case, the defendants even admitted repayment of Rs.5000/- to the plaintiff which plaintiff says was against the cash loan. The defendants, therefore, had full opportunity in this very suit to prove that as per the total amount, either the plaintiff's amount is not due in defendants or they could have taken a plea that in fact the defendant is entitled to decree in his favour by filing counter claim, may it be, as counter money suit or may it be asking for accounts from the plaintiff. Even the defendant could have filed the counter claim for rendition of account in the plaintiff's suit but it cannot be held that the plaintiff's suit as framed was not maintainable.

So far as merit is concerned, it is clear that the facts so far as advancement of money and repayment of the part of the money are concerned, they are admitted facts. The plaintiff proved his case by cogent documentary evidence and those are books of accounts whereas the defendants failed to produce the books of accounts to show that

Rs.9000/- was received by the defendant not as cash loan but as payment against defendant's amount due in plaintiff and Rs.5000/- was not repaid against the cash loan of Rs.9000/- but was an independent transaction. The defendant even admitted that his ledger has not been maintained as per Section 34 of the Evidence Act and in it he entered amount whenever it came in his knowledge.

In view of the above, the first appellate court committed error of law in interfering in the judgment and decree passed by the trial court on absolutely wrong assumption of law. The first appellate court committed error of law by refusing interest over the due amount on the ground that earlier neither the plaintiff nor the defendants levied interest over any due amount. At this point, the trial court failed to notice that after notice by the plaintiff, the defendants retained the money of the plaintiff against the plaintiff's wish. The two parties may agree for not charing interest but when one party without lawful authority, retained other's money then he could do so at least with a liability of interest.

The first appellate court committed serious error of law in dismissing the appeal of the plaintiff-appellant as infructuous so far as claim of interest is concerned. Since it is old matter of the year 1978, therefore, it will be appropriate to award simple interest @ 6% per annum on principal amount of Rs.3712/- from the date of decree passed

by the trial court.

In view of the above reason, the appeal of the appellants is allowed. The judgment and decree of the first appellate court dated 19.7.1983 is set aside. The judgment and decree of the trial court dated 25.7.1981 is upheld with modification of awarding interest @ 6% per annum from the date of decree passed by the trial court till it is paid to the plaintiff. No order as to costs.

(**PRAKASH TATIA),J.**

mlt.